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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. ...812

J. M. BROWN, JR., H. M. BAUM, A. R. THOMAS, J. B. OTTS, JR., WILLIAM F. PENNINGTON, OLIVER C. BREEDLOVE, HOWARD EUGENE ANDERSON, BRUCE BARNETT, M. L. HALL, J. M. WELDON, H. K. PARKER, W. L. GRISSOM, C. L. McCUTCHEON and R. H. LETCHMAN,
Petitioners and Appellees Below,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Respondent and Appellant Below.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

ERLE PETTUS, JR.,
Tenth Floor, Massey Building,
Birmingham 3, Alabama,
Attorney for Petitioners.

JACKSON, RIVES, PETTUS & PETERSON,
Tenth Floor, Massey Building,
Birmingham 3, Alabama,

R. MACEY TAYLOR,
Frank Nelson Building,
Birmingham 3, Alabama,
Of Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes	3
(a) Sec. 6 of Norris LaGuardia Act (Title 29, U. S. C. A., Sec. 106)	3
(b) Railway Labor Act [Title 45, U. S. C. A., Secs. 153 (i) and 156]	3–4
Statement of the Case	5
(a) Pleadings and Proceedings in Courts Below	5
(b) Statement of Facts	6
Basis of Federal Jurisdiction	11
Argument	12
Conclusion	21
Proof of Service	21
Appendix A—Opinion Below	23
Appendix B—Judgment Below	39

AUTHORITIES.

Cases Cited.

Alabama Cartage Co. v. International B'hood, etc., 250 Ala. 372, 34 So. 2d 576, 2 A. L. R. 2d 1273	19
Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810	19
Brotherhood of Railroad Trainmen etc. v. Chicago River and Indiana Railroad Company, 353 U. S. 30, 77 S. Ct. 635, 1 L. ed. 2d 622	15

Kingston Trap Rock Co. v. International Union, etc., 126 N. J. Eq. 570, 19 A. 2d 661 19

Manion v. Kansas City Terminal Rwy. Co., 353 U. S. 927, 77 S. Ct. 706, 1 L. ed. 2d 722 .....14, 15

Marvel Banking Co. v. Teamsters Union, 5 Wash. 2d 346, 105 P. 46 19

Mastro Plastics Corp. et al. v. National Labor Relations Board, 350 U. S. 270, 100 L. ed. 309, 76 S. Ct. 349 19

Norfolk & Portsmouth Belt Line RR. Co. v. Brotherhood, 248 F. 2d 34 .....15, 20

Order of Railway Conductors v. Pitney, 326 U. S. 561, 90 L. ed. 318, 66 S. Ct. 322 17

Order of Railway Conductors v. Southern Rwy. Co., 339 U. S. 225, 94 L. ed. 811, 70 S. Ct. 585..... 17

Russell v. International Union, etc., 258 Ala. 615, 64 So. 2d 384 .....5, 14

Slocum v. Del. L. & W. R. Co., 339 U. S. 239, 94 L. ed. 795, 70 S. Ct. 577 .....5, 17

United Brotherhood of Carpenters v. United States, 330 U. S. 395, 67 S. Ct. 775, 91 L. ed. 973 .....12, 13

United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656, 98 L. ed. 1025, 74 S. Ct. 833 .....5, 14

Statutes Cited.

Title 28, U. S. C. A., Sec. 1254 (1) 2

Title 29, U. S. C. A., Sec. 106 ..... 2, 3

Title 45, U. S. C. A., Sec. 153 (i) 4

Title 45, U. S. C. A., Sec. 156 .....3, 4, 19

Textbook Cited.

Labor Contract—Right to Strike, 2 A. L. R. 2d 1278.. 19

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To the United States Court of Appeals for the Fifth Circuit.

The above named petitioners (hereinafter referred to as defendants) pray that a writ of certiorari issue to review the judgment in favor of the respondent (hereinafter referred to as plaintiff) of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW.

There was no opinion of the United States District Court for the Northern District of Alabama. The opinion of the Court of Appeals (infra, Appendix A, pp. 23 to 38) has not been reported as of the date of preparation of this petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 24, 1958 (infra, Appendix B, p. 39). No application for rehearing was made to the Court of Appeals. The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C. A., Sec. 1254 (1).

QUESTIONS PRESENTED.

QUESTION 1.

Where a labor organization of railroad employees and members thereof, are participating or interested in a labor dispute, involving a carrier and some of the members of such organization, resulting, without authority of such organization, in a walkout of some 2500 railroad employees, including thirteen of the members of such organization and a member of another organization of railroad employees, who as individual defendants in a common law conspiracy action instituted by plaintiff carrier in the Federal District Court are charged with responsibility for unlawful acts, are such individual defendants so charged with responsibility for unlawful acts entitled to the benefit of Sec. 6 of the Norris-LaGuardia Act (Title 29, U. S. C. A., Sec. 106)?

QUESTION 2.

Where defendant railroad employees walkout or strike as a result of a labor dispute with plaintiff carrier prior to the submission of such dispute to the jurisdiction of the National Railroad Adjustment Board, is such walkout or strike "illegal" under the Railway Labor Act?

QUESTION 3.

Does the Federal District Court have jurisdiction under the Railway Labor Act, without prior resort to the National Railroad Adjustment Board, to construe a collective bargaining agreement between plaintiff carrier and the

Brotherhood of Locomotive Firemen & Enginemen (BLF&E), a railroad labor organization, in order to determine the following separate questions under such agreement:

(a) Whether defendant railroad employees covered by such agreement have procured a breach thereof by failing and refusing to follow "specified procedure" as provided in such agreement; and,

(b) Whether plaintiff carrier breached such agreement and the Railway Labor Act by abolishing the outside hostler helper positions without giving the statutory 30 days notice as provided in Title 45, U. S. C. A., Sec. 156.

STATUTES.

Sec. 6 of the Norris-LaGuardia Act reads as follows:

> "§ 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents.
>
> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."
>
> Title 29, U. S. C. A., Sec. 106.

Pertinent sections of the Railway Labor Act read as follows:

> "§ 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards.
>
> "• • • (i) The disputes between an employee or group of employees and a carrier or carriers growing

out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending or unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. * * * "

Title 45, U. S. C. A., Sec. 153 (i).

"§ 156. Procedure in changing rates of pay, rules, and working conditions.

"Carriers and representatives of the employees shall give at least 30 days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Title 45, U. S. C. A., Sec. 156.

STATEMENT OF THE CASE.

(a) Pleadings and Proceeding in Courts Below.

Plaintiff railroad sued its defendant employees in a civil action filed on October 25, 1955, in the United States District Court for the Northern District of Alabama for $250,000 damages (R. 1). Jurisdiction was invoked on the basis of diversity of citizenship and an amount in controversy in excess of $3,000.00. The trial court, on motion of defendants, dismissed the original complaint, consisting of three counts, on the theory that the National Railroad Adjustment Board under the Railway Labor Act as construed in **Slocum v. Del. L. & W. R. Co.**, 339 U. S. 239, 94 L. ed. 795, 70 S. Ct. 577, had primary jurisdiction to interpret the provisions of the Railway Labor Act and the agreement of BLF&E with plaintiff (Firemen's Agreement, Deft. Ex. 5, original exhibit) necessarily involved in those counts (R. 24-27, 50-51). Plaintiff thereupon filed Amended Count Three, a common-law count for damages, charging the defendant employees with a conspiracy to interfere with plaintiff's railroad business by causing "other employees of plaintiff, by means of intimidation or threat of force or violence, not to perform their duties with plaintiff" thereby causing a work stoppage on October 23, 1955, to plaintiff's damage (R. 51, 52). The trial court sustained Amended Count Three against defendants' motion to dismiss on the authority of **United Construction Workers v. Laburnum Construction Corp.**, 347 U. S. 656, 98 L. ed. 1025, 74 S. Ct. 833, and **Russell v. International Union, etc.**, 258 Ala. 615, 64 So. 2d 384, which had been cited in previous rulings by the Court (R. 47, 105). After a trial in the Federal District Court on Amended Count Three, lasting six days, the jury returned a verdict for each defendant and appropriate judgments were entered on the verdicts (R. 1525-1530). Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit following the denial of its motion for

new trial (R. 1559, 1560). The Court of Appeals reversed and remanded the case to the District Court for a new trial on Counts Two and Three of the original complaint and Amended Count Three (infra, Appendix A). Count Two is based on the alleged wrongful interference by defendants with the collective bargaining agreement between plaintiff railroad and BLF&E, to which organization thirteen of the defendants belong (R. 3, 4, 314, 883, 979, 1001, 1085, 1114, 1168, 1234, 1253, 1305, 1329, 1374, 1396). Count Three is a common-law conspiracy action for damages for causing a work stoppage similar to Amended Count Three except that there is no allegation of threat of force or violence or intimidation of other employees (R. 4-5). Both Counts Two and Three also contain reference to the same work stoppage referred to in Amended Count Three (R. 1-5, 51). Each Count is quoted verbatim in the opinion of the Court of Appeals (infra, Appendix A).

(b) **Statement of Facts.**

(1) **Events Preceding Walkout of October 23, 1955.**

The walkout or strike of plaintiff's railroad employees, referred to in each Count of the complaint, commenced at the Boyles Yard at Birmingham, Alabama, about 9:00 P. M. Sunday, October 23, 1955 (R. 1344). Walkouts of plaintiff's employees also occurred at the yards at Decatur, Alabama, on October 24, 1955, and Montgomery, Alabama, on October 25, 1955 (R. 270, 672, 678). The walkouts, which involved about 2,500 employees, ended Wednesday night, October 26, 1955 (R. 1346, 1352).

The opinion of the Court of Appeals oddly enough omits mention of any facts regarding the labor dispute resulting in the walkout which commenced at the Boyles Yard on the fifth day after plaintiff posted on its bulletin board the following notice:

"Defendants' Exhibit 1.

Louisville and Nashville Railroad Co.
Office of Master Mechanic

Bulletin #135

Boyles, Ala., October 19, 1955.

S&NA Division

All Outside Hostler Helpers:

The following Outside Hostler Helpers' positions will be abolished at the end of shift Sunday, Oct. 23, 1955:

Ed Dorrity—Seniority Date 8-27-22, Second Shift.

W. L. Grissom—Seniority Date 9-30-25, First Shift.

C. L. McCutchen—Seniority Date 7-31-41, Third Shift.

J. B. Quiggins, M. M.

JBQ—ewb

Cy—Mr. Ed Dorrity
Mr. W. L. Grissom
Mr. C. L. McCutchen
Mr. J. B. Otts, L. C.
All Roundhouse Foremen"

(R. 1471, 1472.)

The outside hostler helpers, who perform similar duties to those of firemen, are covered by the Firemen Agreement (Deft. Ex. 5, R. 1330, 1573). The notice abolishing the outside hostler helper positions occasioned widespread dissatisfaction and comment among the employees (R. 223, 538, 1019, 1277). Hostlers, who perform duties similar to engineers, consider it dangerous to operate engines without the assistance of competent hostler helpers (R. 230, 231, 894, 895, 920, 1049, 1050). Employees feared that if the

railroad company could abolish a craft covered by such an agreement on a five day notice, any craft could be so abolished (R. 449).

Rumors of an impending walkout commenced shortly after the abolition notice was first published and continued until the walkout occurred (R. 216, 408, 410, 519, 722). Ben Mitchell, Trainmaster, and other railroad officials were alerted for a strike on Sunday, October 23, 1955 (R. 410). Contrary to his usual custom, Mitchell remained on duty at the Boyles Yard Sunday afternoon and night until the walkout occurred (R. 309, 313, 333). Acting on instructions, the Engine Dispatcher called no train crews for any train later than 8:55 P. M. This action was at variance with the usual procedure of calling crews for trains usually scheduled for later runs (R. 295, 301, 302).

Defendants J. B. Otts, Jr., as Local Chairman of the Brotherhood of Locomotive Firemen and Enginemen, objected to the abolition of the hostler helper positions to plaintiff's master mechanic and was informed that the decision had been made to replace the outside hostler helpers with laborers (R. 1331, 1333). Upon being so rebuffed, defendant Otts referred the outside hostler helper problem to his General Chairman at Louisville, Kentucky, Mr. Jake Paschall (R. 1334). A letter from Mr. Paschall to plaintiff protesting plaintiff's action abolishing the hostler helper positions was read at a Local Lodge Meeting of the BLF&E on Friday, October 21, 1955 (R. Deft. Ex. 6, 1334, 1335, 1473). Following the Lodge Meeting, some hostler helpers and a few others decided to hold a meeting at defendant Parker's house on Sunday, October 23, 1955, to discuss ways and means of handling the case involving the abolition of the hostler helper craft at Birmingham (R. 1336).

About twenty men, most of whom were firemen, attended the Parker house meeting on Sunday, October 23, 1955, at

about 4:30 P. M. The abolition of the hostler helper jobs was discussed at the meeting in small, disorganized groups (R. 252, 288, 1170, 1204, 1341, 1342, 1378, 1380). No one called the meeting to order and there was no one in charge (R. 1170, 1380). There was a conflict in the testimony as to whether the possibility of a walkout was discussed. Some testified that there had been talk of a walkout (R. 182, 245). Most of the men denied hearing any discussion of a walkout or strike and testified that the consensus of the meeting was to handle the hostler helper dispute as a grievance (R. 1279, 1291, 1293).

(2) The Walkout of October 23, 1955 and Subsequent Events.

The walkout occurred at the Boyles Yard sometime around 9:00 on the night of October 23, 1955 (R. 926). Ben Mitchell, Trainmaster, testified that defendant Baum appeared at the office in company with Tommy Davis and C. A. Myrick in street clothes carrying small sticks at about 9:00 o'clock and yelled, "We're shutting the railroad down. Everybody go home" (R. 311). Defendant Baum and Mr. Davis both denied participating in any such activity (R. 1173, 1425). Other witnesses in the office with Mitchell testfied that they did not see any defendant present on the occasion concerning which Mitchell testified although one or more unidentified individuals yelled, "All right, let's go" (R. 858, 859, 1156). Defendant Pennington, who was on duty in the Boyles Yard as foreman of a switch crew, and others working in the yard that night, heard unidentified voices in the dark calling out that there was "labor trouble" and "let's go" (R. 423, 925, 926, 927).

While the walkout was in progress, defendant Otts, accompanied by Mr. N. B. Cunningham, Vice Chairman of the General Grievance Committee of the BLF&E conferred with Mr. Kirschner, plaintiff's Division Superintendent, concerning the walkout on Tuesday, October 25,

1955 (R. 1349, 1350). Defendant Otts testified that Mr. Kirschner was informed: "in our opinion that if he would restore the outside hostler helper jobs that the men would go back to work" (R. 1350). At another conference the next day—Wednesday, October 26, 1955—Mr. Cunningham and defendant Otts met with the railroad officials with a view to getting the men back to work and Mr. Cunningham offered his "good offices" to get them back (R. 1351). Plaintiff's employees returned to work that night (R. 1352).

The only employees who testified to being subjected to any threats or intimidation at anytime during the walkout may be briefly summarized by locality as follows:

Birmingham.

Ben Mitchell, Trainmaster at Boyles, was the only employee who claimed that he had been touched by any defendant. Mitchell testified that on Monday, October 24, 1955, at about 8:30 A. M., defendant Thomas pushed him "back a little bit" thereby preventing his entry to plaintiff's office at Morris Avenue (R. 318). Later in the morning, Mitchell went through the Boyles Yard to check some waybills after talking to defendant Thomas at the gate (R. 381, 389). Defendant Thomas denied making any threats or intimidative demonstrations toward Mitchell on any occasion (R. 1032, 1033, 1034, 1035, 1036, 1039).

Lee Thomas, a colored fireman, testified that defendant Weldon boarded a passenger engine at the L&N Station at Birmingham on which he was riding at 11:30 P. M., October 23, 1955, and made threatening gestures toward him with a knife (R. 571). Defendant Weldon denied the accusation (R. 1004).

Decatur.

Mr. Petty, Chief Clerk, Mr. Long, Rate Clerk and Mr. Smith, Cashier at the Freight Office at Decatur, Alabama,

testified that defendant Pennington in the late afternoon of October 24, 1955, had made threats to them and had forbade them to return to work the next day (R. 266, 564, 593, 594, 596). Messrs. Petty, Long and Smith had returned to the Freight Office the following day and spent one-half hour there. No one else reported and they left (R. 601). Mr. Petty stated that there was no violence whatever at Decatur (R. 566).

Montgomery.

T. B. Wilder, one of plaintiff's locomotive engineers, testified that he had been prevented from working at Montgomery, Alabama, on October 25, 1955, as a result of threats made by J. B. Byram and H. D. Dismukes, defendants who were not served in time for trial (R. 633, 634). Neither Byram nor Dismukes testified. The walkout at Montgomery was peaceful (R. 678).

Plaintiff offered evidence of damages on the theory of loss of profits and extraordinary expenses occasioned by the walkout (R. 813, 814, 823, 833, 1573, Pl. Exs. 2 and 3). Defendants offered evidence that none of plaintiff's 2500 employees participating in the walkout were paid by plaintiff during the walkout and hence the savings in wages precluded any loss of profits and more than offset extraordinary expenses (R. 936, 1006, 1168, 1211, 1239, 1260, 1313, 1347).

BASIS OF FEDERAL JURISDICTION.

Federal jurisdiction in the Court of the first instance, the United States District Court for the Northern District of Alabama, is based on diversity of citizenship and an amount in controversy in excess of $3,000.00.

ARGUMENT.

(a) ARGUMENT—QUESTION 1: The Court of Appeals Failed to Follow United Brotherhood of Carpenters v. United States, 330 U. S. 395, in Holding Sec. 6, Norris-LaGuardia Act Not Applicable to Defendants.

The Court below held that the defendants were not entitled to the benefit of Sec. 6 of the Norris-LaGuardia Act because they were individuals engaging in "an illegal strike in which a labor organization of which they are members is not interested." The so-called "illegal strike" (a misnomer dealt with hereafter) was the consequence of a labor dispute in which the BLF&E was interested and participating. Thirteen of the defendants belonged to that organization while the fourteenth was a member of the Brotherhood of Railroad Trainmen. While it is true that the BLF&E did not authorize any strike or walkout, nevertheless, that organization was participating or interested in the labor dispute involved in the walkout, by representing its outside hoslter helper members in protesting the abolition of their positions and in having one of its Vice Presidents confer with plaintiff's officials about the labor dispute involved in an effort to get the men back to work (Deft. Ex. 6, 1334, 1473, 1349-1351). The evidence, therefore, shows union participation or interest in a labor dispute—if that is the requirement of Sec. 6 of the Norris-LaGuardia Act. We submit, however, that the correct interpretation of that section only requires participation or interest in a labor dispute by either the union, or an officer or member of the union. The holding of this court in **United Brotherhood of Carpenters v. United States**, 330 U. S. 395, 67 S. Ct. 775, 91 L. ed. 973, is that Sec. 6 of the Norris-LaGuardia Act applied to "organizations and their members alike" and that members involved in a conspiracy even though acting "without association au-

thority" were nevertheless entitled to the protection of Sec. 6. The Court below attempted to distinguish the **Carpenters** case on the ground that in that case the protection was available to members of the Brotherhood which was a participant in the alleged conspiracy, whereas the protection was not available in the instant case because no union is a party (infra, Appendix A). This attempted distinction is in the teeth of the decision of this Court in the **Carpenters** case expressed as follows:

> "'It is suggested that since "conscious participation" was required for conviction by the instructions given, error as to the individual defendants cannot be found under any theory of the rule of § 6. But we think that failure to instruct the jury on the imputation of guilt from the acts of others as limited in labor disputes by § 6 affects the individuals as well as the associations. **The section covers organizations and their members alike. Individuals, without association authority, may be guilty of such a conspiracy as this under the Sherman Act, but under § 6 they will not be guilty merely because they are members or officers of a guilty association. Nor are individuals guilty because of acts of other individuals in which they did not participate, or which they did not authorize or ratify.** Although an illegal conspiracy under the Sherman Act was proven at the trial, the individuals are entitled to have their participation weighed by a jury under an instruction explaining the circumstances under which § 6 permits acts of other individuals or of associations or of organizations in labor disputes to create personal liability. • • • '" (Emphasis supplied.)
>
> **United Brotherhood of Carpenters v. United States,** 330 U. S. 395, 67 S. Ct. 775, 91 L. ed. 973, at pages 986, 987.

The Court of Appeals failed to follow the decision of this Court in the **Carpenters** case.

Applying Sec. 6 of the Norris-LaGuardia Act to the defendants in this case, the evidence was insufficient to prove them guilty of preventing fellow employees from working through violence or intimidation and hence the proof failed to bring the case tried under Amended Count Three which was founded upon **United Construction Workers v. Laburnum Construction Corp.**, 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025, and **Russell v. International Union, United Automobile, Aircraft & Agricultural Implement Workers of America**, 258 Ala. 615, 64 So. 2d 384, second appeal: 264 Ala. 456, 88 So. 2d 175; certiorari granted 352 U. S. 915, 77 S. Ct. 213, 1 L. ed. 1211. On this ground and others assigned in a motion timely filed in the trial court defendants were entitled to a directed verdict.

(b) ARGUMENT—QUESTION 2: **The Court of Appeals Erroneously Held That the Walkout or Strike of Defendant Railroad Employees Was an "Illegal Strike" Under the Railway Labor Act, Contrary to Manion v. Kansas City Terminal Railway Company, 353 U. S. 927.**

The defendants, together with 2500 fellow railroad employees, walked out in a labor dispute over the arbitrary abolition of outside-helper positions by plaintiff. Without submission of the labor dispute to the National Railroad Adjustment Board (in fact within less than forty-eight hours after the walkout commenced) plaintiff instituted the instant damage suit against defendants in the Federal District Court upon one theory, among others, that the strike was illegal under the Railway Labor Act.

While there is no express provision of the Railway Labor Act providing that a strike of railroad employees is

illegal, this Court has held in **Brotherhood of Railroad Trainmen etc. v. Chicago River and Indiana Railroad Company,** 353 U. S. 30, 77 S. Ct. 635, 1 L. ed. 2d 622, that a Federal District Court may enjoin a strike over a labor dispute **which has been submitted to the National Railroad Adjustment Board under the Railway Labor Act.** Some two weeks after the **Chicago River** case, this Court held that a state court could not enjoin a strike by railroad employees as a violation of the Railway Labor Act prior to the submission of the labor dispute involved to the National Railroad Adjustment Board under the Railway Labor Act. **Manion v. Kansas City Terminal Rwy. Co.,** 353 U. S. 927, 77 S. Ct. 706, 1 L. ed. 2d 722.

The Court of Appeals was of the opinion that the instant case did not "fall squarely into the pattern" of either the **Chicago River** or **Manion** cases, but "in logic it much more resembles **Chicago River** than **Manion.**" The conclusion was accordingly reached that the strike was "illegal." We submit that, on the contrary, the instant case falls squarely within **Manion** because there is no prohibition, express or implied, in the Railway Labor Act of a strike prior to **actual** submission of the labor dispute involved to the National Railroad Adjustment Board. Under **Manion** therefore, the walkout or strike in the instant case is not affected by the Railway Labor Act because the labor dispute causing the strike was not submitted to the National Railroad Adjustment Board.

Another indication of the failure of the Court of Appeals fully to appreciate the holding in **Manion** is the citation of **Norfolk & Portsmouth Belt Line RR. Co. v. Brotherhood,** 248 F. 2d 34, as being as "similar in all respects to our conclusion". The vital distinction is that in the case cited the labor dispute had been submitted to the National Railroad Adjustment Board so that in granting the injunction against a strike **Chicago River** was direct authority, whereas

in the **Manion** case, of course, the dispute had not been submitted to the Adjustment Board.

One further comment concerning **Chicago River** is appropriate. It does not follow from **Chicago River**, as reasoned by the Court below, that both an injunction and a common law conspiracy action are permissible in case of a strike over a labor dispute submitted to National Railroad Adjustment Board. The final question as stated in the opinion of **Chicago River** was whether compliance with the provisions of the Railway Labor Act could be compelled "to the extent of enjoining a union from striking to defeat the jurisdiction of the Adjustment Board". There is no general language of "illegal strike" used in the **Chicago River** opinion. Upholding the jurisdiction of the National Railroad Adjustment Board of disputes pending before it is the key to **Chicago River.** That purpose is no more served by permitting a common law conspiracy action in the Federal District Court based on a strike over a dispute actually before the Adjustment Board than is the strike itself. Injunction is the remedy to preserve the status quo without disruption either by a strike or a damage suit over the strike. The right to strike cannot be said to be "taken away" by the Railway Labor Act, as held by the Court of Appeals in the instant case, but only subject to restraint by injunction where the dispute is actually pending before the National Railroad Adjustment Board to the end that its jurisdiction remains unimpaired. An injunction to restrain a strike over a dispute submitted to the National Railroad Adjustment Board is consistent with the recognition of the paramount jurisdiction of the Board over railroad labor disputes submitted to it whereas a common law conspiracy action based on a strike involving a dispute submitted to the Board is in conflict with such paramount jurisdiction of the Board because many common questions in connection with such dispute are necessarily involved. In the injunction action

there is no possible conflict between the Federal District Court and the National Railroad Adjustment Board whereas in the common law conspiracy action conflict between the Court and the Board is inevitable. To countenance a common law conspiracy action would encourage a "race of diligence" by the railroad to seek the Court as a forum for airing labor disputes with its employees instead of submitting same to the National Railroad Adjustment Board. Such practice was condemned in **Order of Railway Conductors v. Southern Railway Company**, 339 U. S. 225, 94 L. ed. 811, 70 S. Ct. 585. The effect of permitting a common law conspiracy action based on a strike in such a situation would, therefore, be in derogation of the jurisdiction of the National Railroad Adjustment Board instead of upholding that jurisdiction. For these reasons, the Court of Appeals not only failed to follow the decision of this Court in the **Manion** case but completely missed the true spirit of **Chicago River** which it purported to follow. From any standpoint, the decision should be reviewed and corrected in an important field of federal law.

(c) ARGUMENT—QUESTION 3: **The Court of Appeals Erroneously Held That the Federal District Court Had Primary Jurisdiction to Construe the Firemen's Agreement Without Prior Resort to the National Railroad Adjustment Board Under the Railway Labor Act Contrary to Slocum.**

It is surprising that the Court below held that the Firemen's Agreement (Deft. Ex. 5) upon which Count Two is based, must be construed in the first instance by the Federal District Court instead of the National Railroad Adjustment Board contrary to **Slocum v. Del. L&W R. Co.**, 339 U. S. 239, 94 L. ed. 795, 70 S. Ct. 577; **Order of Railway Conductors v. Southern Rwy. Co.**, 339 U. S. 225, 94 L. ed. 811, 70 S. Ct. 585; and **Order of Railway Conductors v. Pitney**, 326 U. S. 561, 90 L. ed. 318, 66 S. Ct. 322. In the

opinion of the Court below it is stated: "Count Two alleged that defendants were parties to an agreement between their brotherhood and appellant * * *" while elsewhere it is stated in the opinion that: "Count Two is essentially an action for wrongful interference with contractual rights of others * * *" (infra, Appendix A). Regardless of which of these divergent statements is accurate, it is manifest that under Count Two a construction of the Firemen's Agreement (Deft. Ex. 5) is necessary to determine, among other questions, the following:

(a) Are defendant members of the Brotherhood parties to the agreement so as to be liable directly for any alleged breach thereof?

(b) What is the meaning of the provisions of said agreement with reference to settlement of any grievances or disputes "in a specified manner consistent with the Railway Labor Act"?

(c) Did the defendants cause or procure a breach of the agreement by failing to follow such "specified procedure"?

We submit that the Federal District Court cannot try the case alleged under Count Two without construing the Firemen's Agreement (Deft. Ex. 5) to answer these questions. Under the decisions of this Court, the National Railroad Adjustment Board has primary jurisdiction to construe such agreements. The holding of the Court below as to Count Two was clearly a departure from the rule announced in **Slocum** and other cases of this Court.

In this same vein, however, there is another question of construing such Agreement which applies to Count Three as well as Count Two. Defendants have taken the position consistently that plaintiff first violated such Agreement and the Railway Labor Act in connection with the labor dispute involving the outside hostler helpers. This issue

is pertinent while the right to strike is recognized in Alabama,

Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810;

the right may be abrogated or restricted by a provision in a collective bargaining agreement.

Alabama Cartage Co. v. International B'hood, etc., 250 Ala. 372, 34 So. 2d 576, 2 A. L. R. 2d 1273.

However, any such contractual restriction on the right to strike is removed under generally recognized principles in the event the employer first breaches the contract containing such restriction.

Mastro Plastics Corp. et al. v. National Labor Relations Board, 350 U. S. 270, 100 L. ed. 309, 76 S. Ct. 349;

Kingston Trap Rock Co. v. International Union, etc., 126 N. J. Eq. 570, 19 A. 2d 661;

Marvel Banking Co. v. Teamsters Union, 5 Wash. 2d 346, 105 P. 46.

Anno: **Labor Contract—Right to Strike**, 2 A. L. R. 2d 1278.

Therefore, in the instant case if plaintiff first breached such Agreement and the Railway Labor Act, any restriction, express or implied, on defendants' right to strike either by such Agreement or the Railway Labor Act would be removed. Defendants have maintained that plaintiff first violated the Firemen's agreement (Deft. Ex. 5) and the Railway Labor Act by failing to give thirty days written notice of its intention to change the agreement affecting rates of pay, rules or working conditions by the abolition of the hostler helper positions. See Title 45, U. S. C. A., Sec. 156. The abolition of the outside hostler helper positions patently involved questions relating to

both rates of pay and working conditions. To the extent of replacement by laborers the question arises as to whether such laborer is in fact an outside hostler helper for pay purposes and seniority under the folowing provision of the Firemen's Agreement:

> "b. The term 'helper' applies to employees when used to assist outside hostlers" (p. 111 of Firemen's Agreement, Deft. Ex. 5).

To the extent of no replacement the increased hazard involved to the hostler and other employees necessarily encompasses working conditions. In this case, the problem is not the abolition of a yard or the failure to run an engine. The engine is being run and the question is the right of plaintiff to remove men from the engine who are covered by the Firemen's Agreement (Deft. Ex. 5) under the express definition of "helpers". Despite the language of such Agreement, the plaintiff has taken the position that the abolition of the outside hostler helper positions is not covered thereunder. The resolution of this type of question is a matter within the peculiar competence of the National Railroad Adjustment Board involving of necessity wide knowledge and familiarity with the practice, conditions and customs of the railroad industry.

The problem here of whether the abolition of the outside hostler helper positions is covered in the Firemen's Agreement (Deft. Ex. 5) is not unlike the coverage question in the contract under consideration in **Norfolk & Portsmouth Belt Line R. R. Co. v. Brotherhood, etc.**, 248 F. 2d 34.

In that case, there was some question as to whether the agreement covered the establishment of an additional point for reporting and relief and it was held that an injunction properly should be issued to permit a decision by the National Railroad Adjustment Board to whom the

dispute had been submitted. The opinion of the Court proceeds on the assumption—which is in fact without doubt—that the Adjustment Board is the proper agency to interpret the contract for coverage.

Likewise, in the instant case, there can be no doubt that under the Slocum rule, the questions involving construction of the Firemen's Agreement (Deft. Ex. 5) under Counts Two and Three should be determined by the National Railroad Adjustment Board and not by the Federal District Court in the first instance.

CONCLUSION.

The decision of the Court below involves important questions of the application of federal law in connection with the Railway Labor Act and the Norris-LaGuardia Act to employees in the railroad industry participating in a labor dispute with a carrier. The decision in several instances is at odds with prior decisions of this Court. Certiorari should be granted to review the decision of the Court below.

Respectfully submitted,

ERLE PETTUS, JR.,
Tenth Floor, Massey Building,
Birmingham 3, Alabama,
Attorney for Petitioners.

JACKSON, RIVES, PETTUS & PETERSON,
R. MACEY TAYLOR,
Of Counsel.

Proof of Service.

I, Erle Pettus, Jr., attorney for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this date I served a copy of the

foregoing petition for certiorari on the respondent, Louisville & Nashville Railroad Company, by mailing a copy thereof, first class postage prepaid, to its Attorney of Record, James A. Simpson, Esq., Security-Exchange Building, 4th Avenue and 20th Street, North, Birmingham, Alabama.

This .... day of February, 1958.

.....

Erle Pettus, Jr.,
Tenth Floor, Massey Building,
Birmingham, Alabama,
Attorney for Petitioners.

APPENDIX A.

Opinion.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 16632.

Louisville & Nashville Railroad Company,
Appellant,

versus

J. M. Brown, Jr., et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

(January 24, 1958.)

Before Borah, Tuttle and Cameron, Circuit Judges.

Tuttle, Circuit Judge: This is an appeal by the Louisville and Nashville Railroad Company from a judgment for the fourteen defendants, its employees, in a suit it had filed for damages resulting from their alleged fomenting of a strike that shut down for three days the plaintiff's railroad operations in Jefferson County, Alabama (including the Birmingham yards). Appellant railroad did not seek an injunction against the defendants. No labor organization is a party to the litigation. The alleged strike, if such it was, was charged in the complaint to be the result of the actions of the individual defendants acting alternatively singly or in concert, not authorized by any railroad brotherhood.

The complaint was in three counts. Each of them was short and to the point.[1] Count One asserts that defendants

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[1] For adequate consideration of the legal issues raised it is deemed necessary that the complaint be set out in full:

"Comes the plaintiff in the above styled cause and exhibits this its complaint in said action as follows:

"1. The plaintiff is a corporation organized and existing under the laws of the State of Kentucky and a resident citizen of said State. Plaintiff is engaged as a common carrier by rail of Interstate Commerce and of the United States mail in and through the Northern District of Alabama in which district it does business by Agent. The defendants are each over the age of 21 years and are resident citizens of Jefferson County, Alabama.

"The amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 and the jurisdiction of this Court is rested upon diversity of citizenship and the amount in controversy. Jurisdiction is further rested as an independent basis thereof upon the existence of a federal question being involved in the issues between the parties as herein averred.

"2. Plaintiff claims of the defendants, separately and severally, the sum of $250,000.00 damages and hereinafter sets forth in separate counts each of its causes of action as follows:

"Count One.

"3. Plaintiff avers that defendants are employees of the plaintiff and that there is imposed upon them and each of them by the provisions of 45 U. S. C., Sections 151, 152, et seq., the duty to exert every reasonable effort to settle all disputes between the plaintiff and its employees whether arising out of the application of previously made agreements or otherwise, in order to avoid any interruption of interstate commerce or of the operation of the business of the plaintiff as a carrier of interstate commerce.

"4. Plaintiff further avers that the defendants, separately and severally, have on or about October 23, 1955, breached and utterly failed to discharge said statutory duty in that they wilfully refused to exert any effort to settle an existing dispute but did on the contrary on or about said date without cause and excuse and without notice to plaintiff, wilfully and maliciously cause a shut-down or work stoppage on the lines of the plaintiff in Jefferson County, Alabama, resulting in a complete paralysis of plaintiff's operation as a common carrier of interstate commerce in said county and surrounding areas and that as a proximate result thereof plaintiff has been injured in the amount of, to-wit, $250,000.00 for which plaintiff makes claim of the defendants herein.

"Count Two.

"5. Plaintiff avers that prior to October 23, 1955 it had entered into an agreement concerning wages, hours, working conditions

were employes and that as such they were charged by the provisions of the National Railway Labor Act, 45 U. S. C. A., §§ 151, 152 et seq., with the duty of exerting all reasonable effort to settle all disputes between themselves and their carrier employer in order to avoid interruptions

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and other matters relating to conditions of employment of certain of its employees among whom were these defendants with a labor organization of which the defendants were on said date and prior thereto members and that the defendants had knowledge of said agreement and the terms thereof. Plaintiff avers that according to the provisions of said agreement all grievances or disputes were to be settled in a specified manner consistent with the Railway Labor Act.

"And plaintiff further avers that on or about said date, the defendants conspired to and in combination did wilfully and maliciously cause or procure a breach of said agreement between plaintiff and the said labor organization in that they did on the occasion of a dispute or grievance within the scope of said agreement fail and refuse to follow specified procedure and did on the contrary render the same impossible in that they did without notice to plaintiff and without legal cause undertake to force plaintiff to yield and forego its right to have such dispute or grievance settled as provided in said agreement and instead to submit without arbitration or hearing to the arbitrary demands of the defendants and that in furtherance of said illegal and wrongful design they did wilfully and maliciously cause a shut-down or work stoppage on the lines of the plaintiff resulting in a complete paralysis of the operations of the plaintiff as a common carrier of interstate commerce in Jefferson County, Alabama, and that the plaintiff was damaged thereby as a proximate result thereof in the amount of $250,000.00 for which plaintiff herein claims damages.

"Count Three.

"6. Plaintiff avers that on, to-wit, October 23, 1955 it was engaged in the lawful business of a common carrier of interstate commerce operating in Jefferson County, Alabama, where it had a right to be and that it was conducting its said operation in a lawful manner. Plaintiff further avers that on or about said date, the defendants did enter into a conspiracy or combination for the purpose of hindering, delaying and preventing the plaintiff from carrying on its lawful business as a common carrier of interstate commerce in that they did wilfully and maliciously and without excuse cause a shut-down or work stoppage of the plaintiff's railroad lines resulting in a complete paralysis of the operations of the plaintiff as a common carrier of interstate commerce in Jefferson County, Alabama, and as a proximate consequence thereof, plaintiff has been damaged in the amount of $250,000.00 for which it claims damages from the defendants."

of interstate commerce; that they breached this "statutory duty" in that they "wilfully and maliciously" caused a shutdown or work stoppage on appellant's lines in stated areas of Alabama to appellant's damage, amounting to $250,000.00.

Count Two alleged that defendants were parties to an agreement between their brotherhood and appellant covering their employment and that of all the members of the brotherhood, and that under its terms all grievances or disputes were to be settled through grievance procedures; that defendants conspired to, and in combination did, wilfully and maliciously cause a breach of the agreement by refusing to follow the specified procedure on the occasion of a dispute or grievance, but rendered the agreed procedure impossible by undertaking to force appellant to yield to their demands and interfered with the contractual relations between appellant and its 2500 employes by wilfully and maliciously causing a shutdown or work stoppage on appellant's railroad in Jefferson County, Alabama, to the same damage of appellant.

The Third Count, as finally construed by the Court, without relying on either the Federal Act or the employment agreement, simply alleged that defendant employes entered into a conspiracy in Jefferson County, Alabama, for the purpose of hindering and preventing plaintiff's interstate commerce carrier from carrying on its lawful business, and that they did so by wilfully, maliciously and without cause, forcing a shutdown of plaintiff's operations, damaging plaintiff in the sum of $250,000.00.

Defendants filed motions to dismiss each count for failure to state a claim on which relief could be granted, and on the ground that the District Court had no jurisdiction, by reason of the availability of an administrative remedy under the Railway Labor Act, supra. The court sustained these motions to the first two counts on the latter ground.

It held Count Three "defective" and sustained the motion, allowing plaintiff the right to file an amendment to this count.

The amended Count Three,[2] on which trial to a jury was subsequently had, differed from the original only in that it charged that in causing the other employes not to perform their duties with plaintiff, defendants did so "by means of intimidation or threat of force or violence." As thus amended the count was permitted to stand.

On its appeal here the railroad company assigns as error the ruling of the trial court in dismissing the three original counts and thus "requiring" it to allege and prove threats, intimidation or violence to stay in court. It also assigned numerous other grounds relating to matters that arose on the trial.

There is one basic question underlying the entire case which must be resolved initially, and when it is disposed of some of the other troublesome questions are eliminated. The question, as we view it, is this:

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[2] Amended Count Three follows:

"Comes the plaintiff in the above styled cause and amends its complaint by striking Count Three thereof and substituting therefor the following:

"Amended Count Three.

"Plaintiff avers that on, to-wit, October 23, 1955 it was engaged in a lawful business, to-wit, that of a common carrier by rail in interstate commerce, and that on or about said date the defendants, being employees of plaintiff, did conspire or combine to interfere with plaintiff's said business and pursuant to said conspiracy or combination did intentionally and without just cause interfere with and prevent plaintiff from carrying on said business in that they caused other employees of plaintiff, by means of intimidation or threat of force or violence, not to perform their duties with plaintiff and did thereby cause a substantially total cessation of plaintiff's operation in Jefferson, Morgan and Montgomery Counties and other places on its lines in the State of Alabama and as a proximate consequence thereof plaintiff was injured and damaged in the amount of $250,000.00 which plaintiff claims of defendants as damages in this cause."

Has the federal trial court, in a diversity case, jurisdiction of a suit for damages by a railroad company against its employes who foment and participate in a strike over individual grievances which are in process of adjustment under the statutory and contractual grievance procedures, but which grievances have not yet been submitted to the National Railway Adjustment Board, because the pre-submission procedure, as called for in the Act and also by the employment contract, have not been completed?

The appellees concede that when a dispute between individual employes and a railroad of the nature here involved—frequently known as "minor dispute"—has actually been submitted to the Adjustment Board, the railroad may enjoin a strike conducted by the brotherhood to vindicate such rights. This was the express holding by the Supreme Court in **Brotherhood of Railroad Trainmen etc. v. Chicago River & Indiana R. R. Co.**, 353 U. S. 30.

Appellees contend that a strike to vindicate such rights may not be enjoined unless the jurisdiction of the Adjustment Board has already attached. In support of this limitation on the applicability of the principle of the Chicago River case they cite **Manion v. Kansas City Terminal Transportation Co.**, 353 U. S. 927.

The case we have to decide does not fall squarely into the pattern of either of these cases. We conclude that in all essential characteristics, and in logic it much more nearly resembles Chicago River than Manion. The court in the former case called attention to the purpose of the National Railway Labor Act, using the following language:

> "This record [referring to the legislative history of the Act] is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. Our

reading of the Act is therefore confirmed, not rebutted, by the legislative history."

Brotherhood of Railroad Trainmen etc. v. Chicago River & Indiana Ry. Co., 353 U. S. 30.

The court found that it would completely frustrate the jurisdiction and authority of the board, to which either party is entitled to take a dispute, if the economic pressure of a strike could be brought to bear to compel a favorable decision while the matter was pending for decision before the board. Here there was no issue pending before the board, because the issue was not ripe for presentation to it. The statute **requires** that disputes be processed by normal grievance procedures,[3] but if no agreement is reached, then either party may refer the dispute to the Adjustment Board.

Obviously the statutory right of either party to refer the dispute to the board would be as effectively frustrated by self-help by one of the parties in the pre-submission stage of the negotiations as it would by strike action after a submission of the issues to the board as in the Chicago River case. The harmful effects would be even more pronounced, for if a strike were permitted before or during negotiations of the grievance which are **required** by the Act, there need be no waiting period at all. It is not believed that the Supreme Court would make illegal a strike

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[3] "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

45 U. S. C.A., Sec. 153, First (i).

commenced after grievance procedure had been completed and appealed to the board in accordance with the statutory provisions, in order to preserve the jurisdiction of the board, but would hold that a strike would be legal if it occurred before the first step had been taken, or, as here, before the first step had been completed. A strike at either stage would effectively nullify the provisions of the Act that guarantee to **either** party an assurance of a board hearing.

What we have said here does not run counter to the Court's per curiam disposition of the Manion case. There the state court had granted an injunction to prevent a strike **after** the grievance procedures had been completed and after more than six months had elapsed, during which time **either** party to the dispute could have referred the matter to the Board. The court reversed the judgment of the state court of appeals affirming the grant of the injunction, "because the dispute here is not pending before the National Railroad Adjustment Board," but in remanding the cause the court did so "without prejudice to the power of the Court of Appeals to **reinstate** its judgment if the dispute is submitted to the Adjustment Board by either party within a reasonable time." (Emphasis added.)

In the case before us neither party **could** submit the dispute to the Adjustment Board at the time of the alleged strike; thus there was no way in which the appellant here could protect its right to a board Adjudication. In Manion all the railroad company had to do on remand, in order to be entitled to a renewal of the injunction, was to submit the dispute to the Board, because all pre-submission proceedings had been completed. Here the dispute was only a few days old when the work stoppage occurred and neither party could go to the board. We think that in that posture of affairs the principle of Chicago River would apply, and that had an injunction been sought because the strike was illegal, it would lie to prevent the

frustration of the statutory grievance-adjustment procedure.

As we have noted, the trial court dismissed the first two counts of the complaint for want of jurisdiction, because, as the court said, the exclusive remedy available to the appellant (to redress the wrongs resulting from the work stoppage) was, under the Railway Labor Act, by submission to the Adjustment Board. The trial court in thus deciding must have accepted the thesis that the work stoppage itself was a dispute which must first go through the grievance procedures and then be submitted to the adjustment board. That this view of the matter is not the law is the clear teaching of the Supreme Court's decisions in both the Chicago River and Manion cases. The court did not there hold that the lower courts did not have jurisdiction over the suits for injunction because of a failure to take the issue of legality of the strike to the board. On the contrary, it affirmed the judgment, granting an injunction in the one, and reversed for a different reason in the other, significantly stating in its mandate that the state court might reinstate its injunction if either party to the "minor disputes" submitted those claims to the Board for decision. Nothing is said by the court that the "dispute" as to the legality of the work stoppage must itself be submitted to the Board rather than to the court in the first instance.

We therefore conclude that the Supreme Court has established the principle that a state or federal court has jurisdiction to adjudicate a complaint that employes are fomenting a strike before or during the orderly processing of minor grievances through the normal grievance machinery or the subsequent procedures before the adjustment board. The appellees lay much stress on **Slocum v. Delaware L. & N. R. R. Co.**, 339 U. S. 239, as depriving the courts of jurisdiction of this "dispute" between the railroad and its employes—the "dispute" being the claim

that the work stoppage was illegally caused by the appellees to the damage of appellant. We do not think this is such a "dispute . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions . . ." as are required under the Act, and therefore by the Slocum decision, to be processed up to and through the Adjustment Board. This is the effect of the two decisions of the Supreme Court already discussed. Otherwise it would have held in both of them that the state trial courts had no jurisdiction to entertain the injunction suits. For a holding similar in all respects to our conclusion, see Norfolk & Portsmouth Belt Line R. R. Co. v. Brotherhood etc., 4 Cir., 248 F. 2d 34.

We hold that the trial court erred in holding that it lacked jurisdiction to consider the first two counts on their merits.

We next apply the above conclusion as to the power of the district court to entertain such a suit to the allegations of the complaint. Appellant urges the view that Count One set out a cause of action because such a cause of action was created by the Railway Labor Act itself. The count asserts that it was the duty of defendant employes under the law to exert all reasonable effort to settle all disputes between themselves and the railroad, but that they breached this "statutory duty" by causing the work stoppage rather than relying on the grievance procedure. The only language of the Act that spells out this statutory duty is found in 45 U. S. C. A., § 152, as follows:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreement or otherwise, in order to

avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

The Supreme Court has held that a major purpose of this Act was to provide a machinery for settling railway labor disputes in a manner that would prevent or minimize strikes. **T. & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks**, 281 U. S. 548. That this was a purpose of the Act is not disputed. However, it does not follow that Congress has, by this announcement of policy, even though stated in the terms of "duty," intended to or succeeded in setting up a statutory right of action for damages for a breach of this duty. Where Congress sought to set up a right of action for damages for breach of duty in other management labor situations, it enacted a statute expressly spelling out the nature of the right of action. See 29 U. S. C. A., § 187, and so also in creating a right of action in the civil rights field. 42 U. S. C. A., §§ 1983, 1985, 1986. We do not think that Congress here intended to or did create a new statutory right of action for damages of the nature declared upon by the plaintiff in Count One.

Count Two is essentially an action for wrongful interference with the contractual right of others. The trial court did not consider this count on the merits, but held that the asserted wrong was one which it had no jurisdiction to adjudicate. Whether such a cause of action is adequately alleged and is cognizable in the courts of Alabama, see **Alcazar Amusement Co. v. Mudd and Colly Amusement Co.**, 204 Ala. 509, ... So. ...., should first be determined by the trial court after adequate argument by the parties. The appellees do not discuss this issue in their brief, being content to rely on the want of jurisdiction of the court to entertain the claim. Having held that the court has jurisdiction, we now let the district court pass first on the sufficiency of the pleading to assert a claim on the remand.

The trial court dismissed Count Three as originally drawn, apparently on the theory that its ruling as to the exclusive jurisdiction of the Adjustment Board over the strike issue should control where there was only a simple allegation that the alleged strike was illegal solely because it contravened the policy of the Railway Labor Act or it interfered with contractual rights entered into pursuant to that act, or was a wrongful interference with appellant's business, but it would not be applicable if appellants alleged a concerted course of action involving threats or intimidation or force or violence. The court thus dismissed Count Three also, because it was "defective," apparently on the theory, not spelled out, that an interference with appellant's business was justified if it arose out of a labor dispute, this being simply a common law cause of action existing, if at all, under the Alabama law. By subsequently permitting the amended Count Three to stand it is apparent that the court held that such justification exists in Alabama only in the absence of violence, threats or intimidation. Cf. **United Construction Workers v. Laburnum Construction Corp.**, 347 U. S. 656. Here too the district court did not pass on the question whether, correctly applying the rule of the Chicago River case, the original count set forth a claim on which relief could be granted. The parties fully argued this point in their briefs and we think it proper for us to decide it. In the light of the fact that it is the clear duty of the Alabama courts to give effect to those decisions in determining whether the normally existing right of labor freely to strike justifies the alleged illegal conduct here, we hold that Count Three, as originally pleaded does set out a claim on which relief could be granted. The principle set down in **Alabama State Federation of Labor v. McAdory**, 246 Ala. 1, 18 So. 2d 810, that such right exists unless surrendered by contract, must be read to mean that the right can either be voluntarily surrendered by contract or, as we have held was the situa-

tion in this case, may be taken away by statute. The Alabama Supreme Court recognized possible limitations on the lawfulness of a strike by legislative action of the nature of requiring "a waiting period" in **Hotel & Restaurant Employes, etc., v. Greenwood,** 249 Ala. 1, 30 So. 2d 696, 703. This case also makes it clear that if the strike is not for a "lawful" objective this would be an exception to the generality of the rule that a strike is justifiable in Alabama. As we have heretofore indicated, the alleged strike here would not under the circumstances charged be one for a lawful objective, because it would be for the purpose of frustrating the grievance adjustment procedure which Congress set up for the orderly settling of railway labor disputes. Hence we conclude that the trial court erred in dismissing Count Three of the complaint in default of allegations of threats or intimidation by force or violence in the conduct of the work stoppage. A wilful interference with appellant's business without the justification normally flowing from a lawful strike is actionable and warrants a judgment for damages in Alabama. **Russell v. International Union,** 264 Ala. 456, 88 So. 2d 175, cert. granted 325 U. S. 915.[4]

Appellant assigns error to numerous charges given by the trial court under the erroneous view of the court that no cause of action could be maintained by plaintiff unless it could allege and prove violence, threats or intimidation. The court charged, in the language of Section 6 of the Norris-LaGuardia Act (29 U. S. C. A., § 106) that:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute shall be held re-

[4] It appears that the holding of the Alabama court is consistent with the Supreme Court decision of United Construction Workers v. Laburnum, supra, in permitting a recovery of damages in an illegally conducted strike; however, it is to be noted that certiorari has been granted in the cited case.

sponsible or liable in any court of the United States for the unlawful act of individual officers, members or agents, except upon clear proof of actual participation in or actual authorization of such acts, or of ratification of such acts as to actual knowledge thereof."

Furthermore, the court charged with respect to each separate defendant:

"23. If you are reasonably satisfied from all of the evidence in the case that defendant, J. M. Brown, Jr., at the time alleged in plaintiff's amended complaint was a member of an association or organization participating or interested in a labor dispute involving a work stoppage of plaintiff's employees, then I charge you that you cannot find in favor of plaintiff and against such defendant unless you are reasonably satisfied from all of the evidence in the case that such defendant actually participated in causing other employees of plaintiff by means of intimidation or threats of force or violence not to perform their duties with plaintiff, or actually authorized another person to cause other employees of plaintiff by means of intimidation or threats of force or violence not to perform their duties with plaintiff, or ratified the act of another person who caused other employees of plaintiff by means of intimidation or threats of force or violence not to perform their duties with plaintiff after actual knowledge thereof."

and also charged with respect to each defendant:

"26. Gentlemen of the jury, I charge you that you cannot find for the plaintiff and against J. M. Brown, Jr., unless you are reasonably satisfied from all the evidence in the case that such defendant actually participated in causing other employees of plaintiff, by means of intimidation or threats of force or violence, not to perform their duties with plaintiff, or actually

authorized another person to cause other employees of plaintiff, by means of intimidation or threats of force or violence, not to perform their duties with plaintiff, or ratified the act of another who caused other employees of plaintiff, by means of intimidation or threats of force or violence, not to perform their duties with plaintiff after actual knowledge thereof."

The effect of this last charge was to instruct the jury that the several defendants were members of an association or organization participating or interested in a labor dispute, and thus nullified the previous charge, and, contrary to all the evidence of the case instructed the jury, as a matter of law, that some union was participating or interested in the dispute. The testimony was undisputed that no brotherhood was in any way a participant in the work stoppage or interested in it in the sense that it had anything to do with it. Appellants contend that the Norris-LaGuardia Act is inapplicable in a strike fomented by individuals acting in concert or conspiracy as alleged here, and not participated in at all by the union. Having found that the alleged strike would be illegal if the allegations of the original count three are established, it may not be necessary for us to pass on this contention, since it would not be necessary for appellant to allege or prove the alleged illegal acts of threat or intimidation of force or violence; however, since the trial court may have felt that Section 6 applied also to the act of conducting an illegal strike, it may be appropriate for us to consider this contention as well.

We thing that the protection of Section 6 of the Norris-LaGuardia Act is not extended to individuals who engage in an illegal strike in which a labor organization of which they are members is not interested. We think there is nothing in **United Brotherhood of Carpenters v. United States**, 330 U. S. 395, to the contrary, for there the individuals as to whom the Supreme Court held the

protection was available were members of the Brotherhood which was a participant in the alleged conspiracy. The same is true in **National Labor Relations Board v. Marshall Co. Wheel & F. Co.**, 5 Cir., 218 F. 2d 409, decided by this court. See also **Bianchi v. United States**, 8 Cir., 219 F. 2d 182, and **Callanan v. United States**, 8 Cir., 223 F. 2d 171. We hold that if 14 different employees, of whom 13 are members of a large brotherhood and the fourteenth is a member of another, neither of which is in any way involved in the strike, engage in an illegal strike by such joint action as would make them liable under the common law of conspiracy, their responsibility for the acts of each other in furtherance of such conspiracy is determined without benefit of Section 6 of the Norris-LaGuardia Act.

Appellant complains that the trial court erred in not directing a verdict against all of the defendants. Even under the simpler theory of recovery which we find the trial court should have applied, there was nevertheless a steadfast denial by the defendants that they caused the walkout. This presented a jury issue, and we cannot say that the trial court should have directed a verdict against any of them.

The assignments of error for failure of the trial court to grant the motion for new trial as amended need not be passed on, because it becomes necessary that the case be remanded for new trial for the reasons we have already stated.

Reversed and remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth
Circuit, New Orleans, Louisiana.

(Seal)

APPENDIX B.

Judgment.

Extract From the Minutes of January 24, 1958.

Louisville & Nashville Railroad Company,

No. 16,632. versus

J. M. Brown, Jr., et al.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, J. M. Brown, Jr., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.